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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 152

TRUST COMPANY OF GEORGIA, Executor Under the Will of Carling Dinkler, Sr., CARLING L. DINKLER, JR., and CORNELIA V. DINKLER; and TRUST COMPANY OF GEORGIA, Executor Under the Will of C. L. Dinkler, Sr., and MRS. JOEL W. DINKLER, Surviving Wife,
Petitioners,

v.

AUBREY C. ROSS, District Director of Internal Revenue,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO GRANTING OF PETITION FOR A WRIT OF CERTIORARI.

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Respondent's opposition is based on the assertion that the decision below is correct and that no conflict exists. Petitioners concede that the decision below does not conflict with the decision of any other Court of Appeals, and have never asserted that it does. But it does conflict with a basic principle laid down by this Court thirty-eight years ago.

I. The Failure of the Court of Appeals to Follow Decisions of This Court.

Respondent's memorandum does not deal at all with Petitioners' showing that the Court of Appeals has decided a federal question in such a way that it is in

conflict with applicable decisions of this Court, **Eisner v. Macomber**, 252 U. S. 189 (1920) and **Lucas v. North Texas Lumber Company**, 281 U. S. 11 (1930). Respondent dismisses those cases by a footnote statement that neither of them "has anything to do with income in respect of a decedent." These cases stand for the two propositions for which they are cited, namely (1) that gain from a capital investment does not occur through growth or increment in value of that investment, but only on realization of a "gain, a profit, something of exchangeable value proceeding from the property" and (2) more specifically, that the unconditional liability of the vendee under an executory contract for the purchase of property does not arise until a tender of **title and the right to possession** is made to the vendee or the transaction is closed. From this it follows that the vendor's right to receive the purchase price does not arise until the same events have taken place.

To support Respondent's assertion that the decision below is correct, he construes section 691 as meaning that since the right received by the executor from the decedent "stemmed from the decedent's execution of the sale contract" it is taxable under that section. Respondent says (Memo. p. 3), "But for the decedent's ownership of the stock and agreement to sell it, the executor's right to collect the contract price would never have arisen." This is another way of stating the ground on which the trial court decided the case, namely that the test is whether the income was the product of decedent's economic activities. However, this test was repudiated by the Court of Appeals, which correctly stated that, in order to be taxed under section 691, the income collected by the executor must be income which the decedent had a right to receive at the time of his death. The error of the Court of Appeals was in its conclusion that the decedent had a right to receive the amount which later came to the

executor, pursuant to an amendment of the sale contract, negotiated by the executor after decedent's death. That conclusion is squarely in conflict with this Court's decision in **Lucas v. North Texas Lumber Company**, *supra*, and with the principles announced in **Eisner v. Macomber**, *supra*.

Respondent cites (Memo. p. 6) seven cases as supporting the statement that section 691 applies "not only to amounts owing to the decedent at the time of his death, but also to amounts which would have been income to him if he had lived to collect them." Of these seven cases, **Davison's Estate v. United States**, 292 F. 2d 937 (Ct. Cl. 1961), cert. denied, 368 U. S. 939 (1961), involved rents due for a period prior to decedent's death; **Riegelman's Estate v. Commissioner**, 253 F. 2d 315 (2d Cir. 1958), **O'Daniel's Estate v. Commissioner**, 173 F. 2d 966 (2d Cir. 1949), **Bausch's Estate v. Commissioner**, 186 F. 2d 313 (2d Cir. 1951), and **Bernard v. United States**, 215 F. Supp. 256 (S. D. N. Y. 1963), all involved compensation for personal services fully performed by the decedent prior to his death; and **Commissioner v. Linde**, 213 F. 2d 1 (9th Cir. 1954), cert. denied, 348 U. S. 871 (1954), was a case in which a sale was completed and the property delivered to the buyer prior to death. Only the decision in **Keck v. Commissioner**, 49 T. C. 313 (1968), by the Tax Court bears any relationship to the issue in the instant case. As we have heretofore pointed out, the Tax Court there based its decision, over the vigorous dissent of five of its members, on the "economic activities" test which the Court of Appeals has here repudiated. The distinction between rents and compensation for personal services on the one hand and of gains from sales, resulting from appreciation over a number of years, was recognized in **Helvering v. Enright**, 312 U. S. 636 (1941), where the Court confined its decision to **"the value of the services rendered by the decedent."**

While **Enright** added a gloss to the normal accounting meaning of "accrued" as used in section 42 of the Revenue Act of 1934, this gloss at the time Section 126 was enacted in 1942 was limited to corporate compensation and partnership income cases where the decedent clearly completed his services to his corporate employer or his partnership at the time of his death with no act left for the executor to perform. Such gloss had certainly not included as accrued income the gain from an executory contract to sell unperformed at the decedent's death. In attempting to bridge this unbridgeable gap, the Respondent has wrenched a portion of the House of Representatives Ways and Means Committee Report from its context in an effort to make it appear that the predicate—"income accrued up to the date of his death"—did not exist. The portion quoted refers back to that predicate by the use of the phrase "such amounts." The same clear reference back also appears earlier in the same paragraph with the use of the words "such income," referring to "income accrued up to the date of his death."

II. The Conditional Nature of Decedent's Contract.

Respondent says (Memo. p. 2) that "with some minor adjustments, the decedent's executor and associates consummated the sale in February 1961." The inference is that the "minor adjustments" did not affect the Petitioner's "right to receive." **North Texas** cannot be distinguished on that ground. In that case, an executory contract to sell was entered into in 1916, and the purchaser declared itself ready to close the transaction "as soon as the papers were prepared." The papers in question which were not prepared and delivered until the following year were described as "the written instruments which were required to complete the transfer." 7 B. T. A. 1193, at 1196. In short, the only condition remaining at the end of 1916 was preparation, delivery and

acceptance of a deed to the property. During the thirty-eight years since the **North Texas** decision, similar issues have arisen where the right to receive proceeds of sale were of a similar nature, and the **North Texas** rule has always been applied. **Bourne v. Commissioner**, 62 F. 2d 648 (4th Cir. 1933), cert. denied, 290 U. S. 650 (1933); **Commissioner v. Segall**, 114 F. 2d 706 (6th Cir. 1940), cert. denied, 313 U. S. 562 (1941); **Chapin v. Commissioner**, 180 F. 2d 140 (8th Cir. 1950).

Under the contract which decedent signed, many conditions remained to be met at the time of his death before there would be any "right to receive," in addition to the preparation of documents of transfer. See Petitioners' brief at pages 4 and 5. One of the most important was the production, at closing, of $6,215,000 in cash in addition to the $500,000 of earnest money. When the time to close approached, it developed that the purchaser did not have the required funds and was unable to borrow the full amount from first line sources. The executor, following extended negotiations, agreed to change the contract provisions, by accepting only $5,715,000 in cash at the closing and increasing the purchaser's note by $500,000. Without the $500,000 amendment there would have been no $2,000,000 loan by the Trust Company of Georgia (R. Vol. I, 111). The executor's right to receive the proceeds of sale, therefore, was not fixed by the decedent's contract but by this new contract of the executor. If the executor had refused to alter the terms of the contract and if the purchaser—a new corporation with only $45,000 of paid-in capital—had defaulted, all the parties to the executory contract would have received only the $500,000 of "earnest money" of which Petitioners' share would have been less than one-third (31.6%). The right to receive that sum, though stemming from the original contract, would not have come into being until the purchaser's failure to perform.

CONCLUSION.

Because of the failure of the Court of Appeals to respect a decision of this Court which has been followed for thirty-eight years, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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